

DOCKET NO.: MON-0292

PATENT



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: **George Preti and
Charles Wysocki**

Confirmation No.: **7665**

Serial No.: **09/887,970**

Group Art Unit: **1616**

Filing Date: **June 22, 2001**

Examiner: **Neil S. Levy**

For: **Use of Odor Reducing and Cross-Adapting Agents to Reduce Animal Waste
Malodors**

**EXPRESS MAIL LABEL NO: EV614722509US
DATE OF DEPOSIT: August 22, 2005**

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Sir:

APPELLANT'S BRIEF PURSUANT TO 37 C.F.R. § 41.37

This brief is being filed in support of Appellant's appeal from the rejections of claims 1 and 35, and the objection to claims 2-6, 36 and 37, dated December 22, 2004. A Notice of Appeal was filed on June 20, 2005.

This appeal brief is being submitted in triplicate, pursuant to 37 C.F.R. § 1.192(a). Appellant respectfully requests that the Examiner's final rejection be reversed and that the application be remanded to the examining group for allowance.

1. REAL PARTY IN INTEREST

The current real party in interest in the present appeal is Monell Chemical Senses Center, 3500 Market Street, Philadelphia, PA, 19104.

2. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to the Appellant, or the Appellant's legal representative, that will directly affect, or be directly affected by, or have a bearing on the Board's decision in the present appeal.

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3. STATUS OF CLAIMS

A. Claims 1-6, 29, 35-37, 41 and 42 are pending. The claims are reproduced in Appendix A attached hereto.

B. Claims 7-28, 30-34, and 38-40 stand withdrawn from consideration.

C. Claims 29, 41 and 42 are allowed.

D. Claims 2-6, 36 and 37 stand objected to, but allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

E. Claims 1 and 35 stand rejected under 35 U.S.C. § 102(b) as allegedly being unpatentable over U.S. Patent No. 4,278,047 to Luca (hereinafter "Luca"). The Examiner indicated in an Interview Summary that an updated search also revealed Stevens and O'Connell (1996) *Chem. Senses* 21(6):711-719 (hereinafter "Stevens"), however, the claims have not been rejected over Stevens.

4. STATUS OF AMENDMENTS

An amendment canceling withdrawn claims is filed concurrently with this Appeal Brief to narrow the issues for purposes of the present Appeal. Further, claim 3 was inadvertently designated as "withdrawn" in the listing of claims in previous amendments, although claim 3 was clearly being prosecuted as evidenced by Applicants' remarks and the Examiner's Actions. Thus, claim 3 is correctly designated as "original" in the amendment and Appeal Brief. In accordance with the accompanying amendment, claims 7-28, 30-34 and 38-40 are designated as "canceled" in this Appeal Brief.

5. SUMMARY OF CLAIMED SUBJECT MATTER

The invention is directed to compositions for and methods of reducing malodor of animal waste (*e.g.*, urine and feces). Embodiments of the invention provide: compositions comprising a cross-adapting agent (canceled claims 14-19); compositions comprising a combination of an odor-reducing agent and a cross-adapting agent (canceled claims 20-25); methods of reducing animal waste malodor by administering an odor-reducing agent and a cross-adapting agent to the animal waste (claims 1-6); methods of reducing animal waste malodor by administering a cross-adapting agent to the animal waste (canceled claims 7-9); methods of reducing animal waste malodor by administering an odor-reducing agent in the

diet of an animal (canceled claims 10-13); methods of reducing animal waste malodor by administering an odor-reducing agent to the diet of an animal and a cross-adapting agent to the animal's waste (canceled claims 14-19); methods of reducing animal waste malodor by administering a composition to animal urine and feces, wherein the composition comprises an odor-reducing agent selected from CCC, bismuth compounds and PAC (allowed claims 29, 41, and 42); methods of reducing animal waste malodor by administering to a locus an odor-reducing agent (canceled claims 31-34); methods of reducing animal waste malodor by administering to a locus an odor-reducing agent and a cross-adapting agent (claims 35-37); and methods of reducing animal waste malodor by administering to a locus a cross-adapting agent (canceled claims 38-40). In contrast to the claims, Luca only discloses that vermiculite, an absorptive agent, may be combined with benzalkonium chloride or a quaternary ammonium compound (which is described in Lucas as a "disinfecting agent") (col. 2, lines 9-13).

6. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Whether the claims 1 and 35, read in light of the Specification, patentably define over Luca.

7. GROUPING OF CLAIMS

Group 1: Claims 1-6 stand or fall together. Each of these claims includes the feature of a *adding an effective amount of a cross-adapting agent to said animal waste*.

Group 2: Claims 35-37 stand or fall together. Each of these claims includes the feature of *adding an effective amount of a composition to a locus, wherein said composition comprises an odor-reducing agent and a cross-adapting agent*.

8. ARGUMENT

In making the rejection at issue, the Examiner has ignored the fact that the claims here are directed to methods that utilize, among other things, a cross-adapting agent. As set forth in the specification at page 6, lines 17-22:

The term "cross-adapting agent" as used herein refers, without limitation, to any compound, agent, or combination thereof that is effective in decreasing sensitivity to one odorant after exposure to the cross-adapting agent. The term includes, without limitation, ethylesters of 3M2H acid. The ethyl esters of 3M2H include, without

limitation, the Z and E ethyl esters. Exemplary homologues include, without limitation, 3-methyl-2-pentenoic (3M2P) and 3-methyl-2-octenoic (3M2O) acid.

In the first action in which Luca was cited as a reference under 35 U.S.C. § 102(b), the Examiner rejected claims 1, 29 and 35 merely stating:

See col. 2, top: Benzalkonium chloride is a disinfectant; both bactericidal and fungicidal-the instant effective amount of cross-adapting agent, with vermiculite, odor absorber, added to animal waste.

(Office Action dated June 23, 2004, page 2, lines 17-19)

Luca does not discuss the concept of cross-adaptation. Luca does not teach that benzalkonium chloride would be effective in decreasing sensitivity to an odorant through cross-adaptation. Although not clearly stated, it appears that the Examiner has nonetheless assumed that a composition having both bactericidal and fungicidal properties is necessarily a cross-adapting agent.

The Federal Circuit clearly and consistently state that “in proceedings before the PTO, claims in an application are to be given their broadest reasonable interpretation consistent with the specification.” *In re Sneed*, 710 F.2d 1544, 1548 (Fed. Cir. 1983)(citing *In re Prater*, 56 C.C.P.A. 1381, 415 F.2d 1393, 1404, 162 U.S.P.Q. 541, 550 (CCPA 1969)). Further, “claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art.” *Id.* at 1548 (citing *In re Johnson*, 558 F.2d 1008, 1016, 194 U.S.P.Q. 187, 194 (CCPA 1977)).

Accordingly, in its response, the Applicant pointed out that Luca did not indicate that benzalkonium chloride was a cross-adapting agent or was being used as such. Applicants specifically noted that the term “cross-adapting agent” was explained in the specification at page 6, lines 17-22 (Response to Office Action of June 23, 2004, filed September 22, 2004, page 7).

In the Final Rejection dated December 22, 2004, the Examiner maintained the rejection of claims 1 and 35 under 35 U.S.C. §102(b) over Luca stating only:

The rejection of record is maintained, we choose to interpret the claim broadly, giving wide scope to effective amount of a cross adapting agent, and see this terminology covering Benzalkonium chloride able to function as an antimicrobial, effective both [*sic*] an antifungal and an antibacterial cross adapting single agent. We so [*sic*]

not see the specification as required to interpret this claim [*sic*]. It is sufficient to read the claims as we have.

Again, there is no suggestion in Luca that a compound having both bactericidal and fungicidal properties would be effective in decreasing sensitivity to an odorant through cross-adaptation.

Applicants' Response to the Final Rejection dated February 22, 2005 noted the Federal Circuit case law and that it was incumbent on the Examiner to read the claim terms consistently with the meaning provided by the applicant in the specification. The Examiner rejected the argument and stated that the request for reconsideration did not place the application in condition for allowance because:

applicant's arguments are not persuasive, in that no specific cross-adapting agent is claimed, thus interpretable as examiner has interpreted. – event the specified agent, is not clearly unknown, however, as indicated in cited prior art of applicants & examiner.

It is difficult to interpret the Examiner's reasons for rejecting the Applicants' arguments based on these statements. Apparently, the Examiner is of the view that a specific cross-adapting agent must be recited in the claims. The Applicants' representative conducted an interview with the Examiner in which the Applicants' representative also pointed out that the Applicants' explanation of "cross-adapting agent" was consistent with the art-recognized use of "cross-adapting" and should not be given the erroneous interpretation of the Examiner. However, the Examiner remained of the view that the specific compounds taught in the specification would be needed to overcome the rejection.

The Applicants have clearly explained in the specification that "cross-adapting agents" decrease sensitivity to one odorant after exposure to the cross-adapting agent. As the cited art does not teach a cross-adapting agent, and there is no evidence of record that teaches or suggests that benzalkonium chloride or quaternary ammonium salt is a cross adapting agent, the rejection in view of Luca should be withdrawn.

For the foregoing reasons, Applicants request that this patent application be remanded to the Examiner with an instruction to both withdraw the rejections presently outstanding and allow the appealed claims.

9. CLAIMS APPENDIX

1. (Previously Presented) A method for reducing animal urine and feces malodor, said method comprising adding an effective amount of an odor-reducing agent and an effective amount of a cross-adapting agent to said animal waste.
2. (Original) The method of claim 1 wherein said odor-reducing agent is selected from the group consisting of chlorophyll copper complex (CCC), bismuth compounds, and powdered activated charcoal (PAC)
3. (Original) The method of claim 2 wherein the bismuth compounds are selected from the group consisting of bismuth salicylate (BiS), bismuth subgallate (BiG) and bismuth citrate (BiC)
4. (Previously Presented) The method of claim 2 or 3 wherein the concentration of odor-reducing agent ranges from about 0.5% to about 15% by weight of said animal urine and feces.
5. (Original) The method of claim 1 wherein the cross-adapting agent is an ester of 3-methyl-2-hexenoic acid, or a homologue thereof.
6. (Previously Presented) The method of claim 5 wherein the concentration of cross-adapting agent ranges from about 0.01% to about 0.75% by weight of said animal urine and feces.
- 7-28. (Canceled)
29. (Allowed) A method for reducing animal urine and feces malodor comprising adding an effective amount of a composition comprising an odor-reducing agent and an effective amount of a cross-adapting agent, wherein said odor-reducing agent is selected from the group consisting of CCC, bismuth compounds, and PAC.

30-34. (Canceled)

35. (Previously Presented) A method for reducing animal urine and feces malodor at a locus, said method comprising adding an effective amount of a composition to a locus, wherein said composition comprises an odor-reducing agent and a cross-adapting agent.

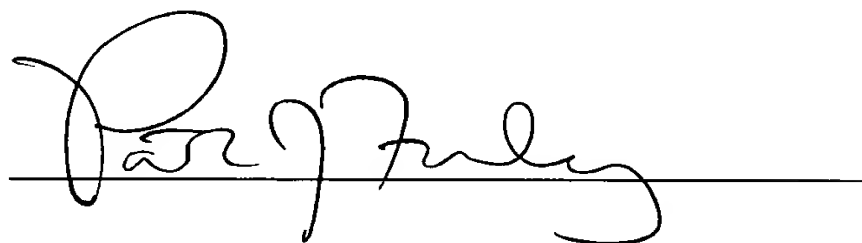
36. (Original) The method of claim 35 wherein the cross-adapting agent is an ester of 3-methyl-2-hexenoic acid, or a homologue thereof.

37. (Original) The method of claim 36 wherein the concentration of cross-adapting agent ranges from about 0.01% to about 0.75% by weight of said animal waste.

38-40. (Canceled)

41. (Allowed) The method of claim 29 wherein said bismuth compounds are selected from the group consisting of BiS, BiG, and BiC.

42. (Allowed) The method of claim 29 wherein said cross-adapting agent is an ester of 3-methyl-2-hexenoic acid, or a homologue thereof.

A handwritten signature in black ink, appearing to read "Patrick J. Farley", is written over a horizontal line.

Date: August 22, 2005

Patrick J. Farley, Ph.D.
Registration No. 42,524

Woodcock Washburn LLP
One Liberty Place - 46th Floor
Philadelphia PA 19103
Telephone: (215) 568-3100
Facsimile: (215) 568-3439